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The Unconstitutional Use of Deadly Force by the Police

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THE UNCONSTITUTIONAL USE OF DEADLY FORCE BY THE POLICE

"The question is . . . whether deadly force could constitutionally be used to effect the arrest of this fleeing eighteen-year-old burglar who threatened no one's life during the commission of the burglary and posed no threat to the apprehending officers or others."[1] Such a question, as framed by the United States Court of Appeals for the Eighth Circuit, has been asked with increasing frequency throughout the country.

Each year numerous incidents similar to that which forms the background for the Eighth Circuit's question occur in the cities of this country.[2] A person, often a teenager, commits a felony—most often a crime against property, such as burglary—and attempts to escape.[3] Although he threatens no one's life during the commission of the crime nor during his attempt to flee from police officers, he is shot and killed by such officers, who act under the authority of applicable state law. This scenario is so often repeated because only a minority of states have imposed statutory restrictions on a police officer's use of deadly force[4] to apprehend a fleeing felon even though the felon himself does not use or threaten to use deadly force against either the officer or any other citizen during the commission of the felony or during the attempt to escape arrest.[5]

When the Eighth Circuit, in *Mattis v. Schnarr*,[6] declared unconstitutional two Missouri statutes allowing the use of deadly force by the police in such situations, its decision, in theory, cast doubt on the con-

1. Mattis v. Schnarr, 547 F.2d 1007, 1011 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

2. *See, e.g.*, C. MILTON, J. HALLECK, J. LARDNER & G. ALBRECHT, POLICE USE OF DEADLY FORCE 33 (1977) [hereinafter cited as POLICE FOUNDATION] for a table reporting the number of civilians killed by the police throughout the nation from 1960 to 1975.

3. In the case decided by the Eighth Circuit, for example, an eighteen-year-old boy, with a seventeen-year-old companion, broke into the unoccupied office of a golf driving range at night in order to take money. Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

4. For the purpose of this note, the term "deadly force" is used as defined in the Model Penal Code:

> '[D]eadly force' means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

MODEL PENAL CODE § 3.11(2) (Proposed Official Draft, 1962).

5. *See* notes 27, 28, and 35 *infra* and the accompanying text for those states that have statutorily restricted the use of deadly force beyond the common law rule.

6. 547 F.2d 1007 (8th Cir. 1976), vacated as moot per curiam sub nom. Ashcroft v. Mattis, 431 U.S. 171 (1977).

stitutionality of laws in at least twenty-nine other states.[7] However, barely two months after the *Mattis* decision, the Court of Appeals for the Sixth Circuit, in *Wiley v. Memphis Police Department*,[8] rejected the Eighth Circuit's reasoning and upheld the constitutionality of a Tennessee statute with provisions similar to those at issue in *Mattis*. Few other courts have been directly confronted with the question of the constitutionality of such state statutes, which essentially embody the common law rule.[9] Those few challenges which have been brought have generally alleged a violation of the right to equal protection of the laws,[10] a denial of due process,[11] or the infliction of cruel and unusual punishment.[12] Yet the Eighth Circuit stands alone in holding that a state statute authorizing the use of deadly force by the police in attempting to arrest any fleeing felon is indeed unconstitutional. The issue of the validity of such statutes remains unresolved at this time, for the Supreme Court of the United States vacated the Eighth Circuit's decision on grounds unrelated to the merits of the case,[13] and, subsequently, the Court denied certiorari on the Sixth Circuit's decision.[14]

This note will first inspect the various current statutory approaches to the issue throughout the country as well as the Model Penal Code[15] approach. The policies of several law enforcement agencies and the recommendations of certain studies will also be discussed. The note will then describe the relevant case law and will analyze the various constitutional arguments which may be used to strike down deadly force statutes in light of the treatment which the courts have afforded such arguments in past decisions. Finally, the note will conclude that the constitutional requirements of at least the eighth[16] and fourteenth

7. *See* notes 25, 27, and 28 *infra*.

8. 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

9. *See* the discussion of the applicable case law in the text accompanying notes 59-142 *infra*. Some courts have only ruled on the common law defense of an officer acting on his reasonable good faith belief that such a use of deadly force was necessary. *See, e.g.*, Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964). The plaintiff in such cases has generally brought his action as a state tort claim for wrongful death or in a suit in federal court for deprivation of civil rights under 42 U.S.C. § 1983 (1970).

10. U.S. CONST. amend. XIV § 1 provides in pertinent part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

11. U.S. CONST. amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV § 1 states:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

12. U.S. CONST. amend. VIII states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

13. Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam).

14. Wiley v. Memphis Police Dep't, 434 U.S. 822 (1977).

15. *See* note 34 *infra* and accompanying text.

16. *See* note 12 *supra*.

amendments,[17] in conjunction with enlightened public policy considerations, demand that such statutes be found unconstitutional.

CURRENT STATUTORY APPROACHES

At common law, the use of deadly force was authorized if it was necessary in order to effectuate the arrest of a fleeing felon but not of a fleeing misdemeanant.[18] The justification for such a distinction rested largely on the fact that all early common law felonies involved force or violence[19] and were punishable by death.[20] Therefore, it was reasoned, killing a felony suspect in the course of attempting to arrest him, without affording him the procedures of a fair trial, merely imposed the certain consequences of his conduct immediately, rather than at a later date.[21]

All jurisdictions in the United States have adopted the common law rule in regard to fleeing misdemeanants.[22] But today, since few crimes are punishable by death and since all jurisdictions have expanded the class of common law felonies to include many crimes not involving force or violence,[23] the given justification for the common law rule in regard to fleeing felons no longer has relevance. Nevertheless, the majority of jurisdictions still basically adhere to the traditional doctrine.[24] Thus, twenty states[25] have codified and still enforce the

17. *See* notes 10 and 11 *supra*.

18. 1 WHARTON'S CRIMINAL LAW, §§ 532, 534 (12th ed. 1932). *See, e.g.*, United States v. Clark, 31 F. 710, 713 (8th Cir. 1887) (dictum); People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); State v. Dietz, 59 Kan. 576, 53 P. 870 (1898); Hill v. Commonwealth, 239 Ky. 646, 40 S.W.2d 261 (1931); Reneau v. State, 70 Tenn. 720 (1879).

19. Arson, burglary, manslaughter, murder, rape, and robbery were the crimes recognized as felonies.

20. *See* MODEL PENAL CODE § 3.07, Comment 3 at 56 (Tent. Draft No. 8, 1958).

21. *See* Tsimbinos, *The Justified Use of Deadly Force*, 4 CRIM. L. BULL. 3, 17 (1968) [hereinafter cited as Tsimbinos]; Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 361, 364-65 (1976) [hereinafter cited as *Deadly Force to Arrest*]. Furthermore, in the early common law a police officer was permitted to use deadly force only if he knew that the fleeing person had *actually* committed the felony and not if he merely reasonably believed that that person had committed the crime. 4 W. BLACKSTONE, COMMENTARIES 289-90 (4th ed. 1771); 1 WHARTON'S CRIMINAL LAW, § 533 (12th ed. 1932).

22. *E.g.*, State v. Wilson, 41 Id. 616, 243 P. 359 (1925); People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); State v. Dietz, 59 Kan. 576, 53 P. 870 (1898); Hill v. Commonwealth, 239 Ky. 646, 40 S.W.2d 261 (1931); Brown v. Weaver, 76 Miss. 7, 23 So. 388 (1898); Reneau v. State, 70 Tenn. 720 (1879).

23. *See* Jones v. Marshall, 528 F.2d 132, 138 (2d Cir. 1975).

24. It should also be noted that seven states have no relevant statutes at all (Maryland, Massachusetts, Michigan, Ohio, Virginia, West Virginia, and Wyoming), while five states have statutes that deal with the use of deadly force in preventing the commission of a crime but not in apprehending the criminal (Georgia: GA. CODE ANN. § 26-902 (1978); Louisiana: LA. REV. STAT. ANN. § 14:20(2) (West 1974); New Jersey: N.J. STAT. ANN. § 2A:113-6 (West 1969); South Carolina: S.C. CODE § 17-13-20 (1976); and Vermont: VT. STAT. ANN. tit. 13, § 2305 (1974)).

25. ALASKA STAT. § 11.15.090 (1970); ARK. STAT. ANN. § 41-510(2)(a) (1977); CAL. PENAL CODE § 196 (West 1970); CONN. GEN. STAT. ANN. § 53a-22(c)(2) (West 1972); FLA. STAT. ANN.

common law rule that deadly force may be used by a police officer in order to apprehend *any* fleeing felony suspect.[26]

Other states have placed varying restrictions on the common law approach. An Arizona statute, for example, modifies the common law rule by prohibiting the use of deadly force against felons who flee from justice or resist arrest without using physical force.[27] Eight other states,[28] following the lead of Illinois in 1961,[29] have substantially re-

§ 776.05 (West 1976); IDAHO CODE § 18-4011 (1947); IND. CODE ANN. § 35-41-3-3(b) (Burns Supp. 1978); KAN. STAT. ANN. § 21-3215(1) (1974); MINN. STAT. ANN. § 609.065(3) (1964); MISS. CODE ANN. § 97-3-15 (1972); MO. ANN. STAT. §§ 544.190, 559.040 (Vernon 1969); NEV. REV. STAT. § 200.140(3)(b) (1975); N.H. REV. STAT. ANN. § 627:5(II)(b)(1) (1974); N.M. STAT. ANN. § 40A-2-7 (1972); OKLA. STAT. ANN. tit. 21, § 732 (West 1951); R.I. GEN. LAWS § 12-7-9 (1969); S.D. CODIFIED LAWS ANN. § 22-16-32 (Supp. 1978); TENN. CODE ANN. § 40-808 (1975); WASH. REV. CODE ANN. § 9A.16.040(3) (1977); WIS. STAT. § 939.45(4) (1973). Although the California Penal Code deadly force statute is apparently only a codification of the common law rule, the California state courts have given the statute a much more restrictive interpretation:

> Thus it appears . . . that the applicable sections of the California Penal Code, as construed by the courts of this state, prohibit the use of deadly force by anyone, including a police officer, against a fleeing felony suspect unless the felony is of the violent variety, *i.e.*, a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.

Kortum v. Alkire, 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26, 30-31 (1977). *See also* Long Beach Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 373-75, 132 Cal. Rptr. 348, 353-54 (1976).

26. The current Indiana statute, which went into effect July 1, 1977, and the statute which immediately preceded it illustrate the two basic forms of such a statute:

> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

IND. CODE ANN. § 35-1-19-3 (Burns Supp. 1976) (in effect prior to July 1, 1977).

> A law-enforcement officer is justified in using force if he reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only if he reasonably believes that that force is necessary: (1) To prevent serious bodily injury to himself or a third person or the commission of a forcible felony; or (2) To effect an arrest of a person who has committed or attempted to commit a felony.

IND. CODE ANN. § 35-41-3-3(b) (Burns Supp. 1978) (current law).

The Tennessee statute at issue in the Sixth Circuit's decision in *Wiley* was such a common law codification: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." TENN. CODE ANN. § 40-808 (1975). The statute was originally enacted in 1858. As early as 1879, the Tennessee Supreme Court was suggesting that, in view of the increase in the number of crimes defined as felonies, the Tennessee legislature should reconsider its rule of law. Reneau v. State, 70 Tenn. 720 (1879). Yet that same Tennessee statute, declared constitutional by the Sixth Circuit in *Wiley*, continues to exist in its common law format.

27. ARIZ. REV. STAT. § 13-410 (Spec. Pamphlet 1978). The statute, effective October 1, 1978, also allows the use of deadly force against a felon escaping from lawful confinement and against any person "actually resisting the discharge of a legal duty with deadly physical force or with the apparent capacity to use deadly physical force." *Id.* The statute essentially follows the common law rule by ignoring the seriousness of the harm to persons which the felon has caused or will cause.

28. DEL. CODE ANN. tit. 11, § 467(c) (1975); ILL. REV. STAT. ch. 38, § 7-5(a)(2) (1977); MONT. REV. CODES ANN. §§ 94-3-106(1) (Spec. Pamphlet 1977), 95-602(b) (1969); N.Y. PENAL LAW § 35.30(1)(a) (McKinney 1975); N.D. CENT. CODE § 12.1-05-07(2)(d) (1976); OR. REV. STAT. § 161.239 (1977); 18 PA. CONS. STAT. ANN. § 508(a)(1)(ii) (Purdon 1973); UTAH CODE ANN. § 76-2-404(2) (Spec. Pamphlet 1977).

29. The Illinois deadly force statute provides in pertinent part:

> [A] peace officer . . . is justified in using force likely to cause death or great bodily harm

stricted the common law approach either by justifying the use of deadly force only in arresting "forcible felony" suspects[30] or by specifically naming certain felonies for the commission of which deadly force may be used in effecting an arrest.[31] In explaining the rationale for such a modification, the drafting committee of the Illinois statute stated: "To authorize the killing of an offender who is not likely to harm anyone if he successfully resists arrest, simply on the ground that his offense is designated as a felony instead of as a misdemeanor, seems indefensible."[32]

However, the drafters of the Model Penal Code indicated that restricting the use of deadly force to situations in which a certain designated felony was committed, without any regard to the nature of and

> only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and (2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

ILL. REV. STAT. ch. 38, § 7-5(a) (1977).

30. Delaware, Illinois, Montana, North Dakota, Pennsylvania, and Utah. *See* note 28 *supra*. A "forcible felony" is defined in Illinois, for example, as "treason, murder, voluntary manslaughter, rape, robbery, *burglary*, arson, kidnapping, aggravated battery and any other felony which involves the use or threat of physical force or violence against any individual." ILL. REV. STAT. ch. 38, § 2-8 (1977) (emphasis added). In Pennsylvania, "forcible felony" has not been defined by the state legislature. Furthermore, Pennsylvania courts have not as yet definitively interpreted the state's deadly force statute. *See, e.g.*, Phillips v. Ward, 415 F. Supp. 976, 978-79 (E.D. Pa. 1975). It has, therefore, been questioned whether the statute is in reality any more restrictive than the common law rule. *See* Comment, *Justifiable Use of Deadly Force in Law Enforcement*, 78 DICK. L. REV. 115, 122 (1973).

The Delaware statute allows the use of deadly force against a fleeing felon who committed a crime "involving physical injury or threat thereof" only if the officer also believes that "there is a substantial risk that the person to be arrested will cause death or serious physical injury, or will never be captured if his apprehension is delayed." DEL. CODE ANN. tit. 11, § 467(c) (1975).

In Montana, the deadly force statute states that "[a]ll necessary and reasonable force may be used in making an arrest. . . ." MONT. REV. CODES ANN. § 95-602(b) (1969). Furthermore, under this statute "[a] peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person." MONT. REV. CODES ANN. § 94-3-106(1) (Spec. Pamphlet 1977). However, the drafting commission comments regarding section 94-3-106(1), after noting that the section concerns the use of deadly force to prevent escape and not the use of force which is justifiable in making the original arrest, includes the following statement: "If the offense for which the person was arrested was not a forcible felony, but the offender was armed with a deadly weapon, deadly force might have been used to effect the arrest." MONT. REV. CODES ANN. § 94-3-106 at 36 (Spec. Pamphlet 1977). The comment thus implies that the use of deadly force is restricted to circumstances in which a forcible felony was committed unless a fleeing felon is armed with a deadly weapon. The Montana statute regarding the use of deadly force to *prevent* the commission of a crime restricts such force to situations involving the commission of a forcible felony. MONT. REV. CODES ANN. § 94-3-102 (Spec. Pamphlet 1977).

31. New York and Oregon. *See* note 28 *supra*. The New York statute does not include within its ambit all crimes denominated burglary; only "burglary in the first degree," which essentially is the unlawful entry of a *dwelling* at night by a person who causes or threatens to cause serious harm to another, is covered by the statute. N.Y. PENAL LAW § 140.30 (McKinney 1975).

32. ILL. ANN. STAT. ch. 38, § 7-5 at 416 (Smith-Hurd 1972). It has been suggested that the substitution of "forcible felony" for "felony" did not fulfill the drafters' avowed intent and is just as indefensible. *See* Note, *Policeman's Use of Deadly Force in Illinois*, 48 CHI.-KENT L. REV. 252 (1971).

the circumstances surrounding that *particular* act, still could result in unjustifiable killings.[33] Instead, the Model Penal Code permits the use of deadly force by a police officer only if the fleeing felon himself had used, or threatened to use, deadly force in committing the crime, or if there is a substantial risk that the fleeing felon will cause death or serious bodily injury to another if his apprehension is delayed.[34]

Nine states[35] have thus significantly departed from the common law rule by adopting versions of the Model Penal Code rule. The Kentucky statute is, in fact, even more restrictive: it is not sufficient that the fleeing felon may have used deadly force in the commission of the crime, but it must *also* be likely that he will again endanger human life unless immediately apprehended.[36]

Clearly, however, there has been no unwavering trend toward the adoption of the Model Penal Code concept by state legislatures.[37] Within recent years the legislative bodies in at least two states, Missouri[38] and Connecticut,[39] have reexamined their respective common-law-based statutes and have declined to adopt a more restrictive policy on the use of deadly force. Furthermore, New York, which had previously enacted a version of the Model Penal Code deadly force rule, has retreated from that position by now specifically naming those felonies for commission of which a fleeing suspect may be killed by the police.[40]

33. MODEL PENAL CODE § 3.07, Comment 3 at 56 (Tent. Draft No. 8, 1958).

34. *See* MODEL PENAL CODE § 3.07 (Proposed Official Draft, 1962) for the full text on the use of force in law enforcement. The relevant portion is (2)(b) which provides as follows:

> The use of deadly force is not justifiable under this Section unless: (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that: (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

35. ALA. CODE § 13A-3-27 (Spec. Pamphlet 1978); COLO. REV. STAT. § 118-1-707(2)(b) (Cum. Supp. 1976); HAW. REV. STAT. § 703-307(3) (1976); IOWA CODE ANN. § 804.8 (West Spec. Pamphlet 1978); KY. REV. STAT. ANN. § 503.090(2) (Baldwin 1975); ME. REV. STAT. tit. 17A, § 107(2)(B) (Spec. Pamphlet 1978); NEB. REV. STAT. § 28-1412(3) (Supp. 1977); N.C. GEN. STAT. § 15A-401(d)(2)(b) (1978); TEX. PENAL CODE ANN. tit. 2, § 9.51(c) (Vernon 1974). Alabama, Colorado, and North Carolina additionally allow the use of deadly force to apprehend a person attempting to escape by the use of a deadly weapon.

36. Ky. REV. STAT. ANN. § 503.090(2)(c) (Baldwin 1975).

37. Idaho, for example, adopted virtually the entire Model Penal Code in 1971 but repealed it effective April 1, 1972, after it had been in effect for only three months. Included among the repealed statutes was the Model Penal Code approach to the use of deadly force.

38. MO. ANN. STAT. §§ 544.190, 559.040 (Vernon 1969). *See also* Mattis v. Schnarr, 547 F.2d 1007, 1022 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

39. CONN. GEN. STAT. ANN. § 53-a-22(c)(2) (West 1972). *See also* Jones v. Marshall, 528 F.2d 132, 135 (2d Cir. 1975).

40. New York adopted the Model Penal Code approach in 1965 but repealed it in 1967, replacing it with a statute listing the specific felonies for commission of which deadly force may be

However, even under the current New York statute,[41] the slaying of a felon fleeing after the commission, or attempted commission, of a burglary is severely restricted to very limited situations[42] and would not have been authorized under the facts of most cases that have considered the constitutionality of deadly force statutes.

MODERN LAW ENFORCEMENT POLICIES

Although state legislatures have been reluctant to modify their respective deadly force statutes from the common law approach, such revisions can be found in the evolving policies of many law enforcement agencies. Few courts which have considered the constitutionality of such statutes have given any indication that they have even considered these modern policies and recommendations in holding, as did the Sixth Circuit, that a common-law-based statute is "necessary to elementary law enforcement."[43] Yet, as the authors of a 1977 Police Foundation[44] report have observed, "the clear trend across the country seems to be toward the adoption of police department firearms use policies, generally narrower than either the statutory or decisional state law that is applicable."[45]

On the federal level, the policy of the Federal Bureau of Investigation adopted in 1972 is that "an Agent is not to shoot any person except, when necessary, in self-defense, that is, when he reasonably believes that he or another is in danger of death or grievous bodily harm."[46] Similarly, the regulations of the Bureau of Narcotics and Dangerous Drugs state that "an agent will not shoot at any person except to protect his own life or that of some other person. Agents will not fire at fleeing suspects or fleeing defendants. . . ."[47]

On the local level, increasing numbers of police departments are unilaterally adopting policies more restrictive than their state laws. A

used. *See* Leibowitz, *Justifiable Use of Force Under Article 35 of the Penal Law of New York*, 18 BUFFALO L. REV. 285 (1969), for a criticism that the New York law on deadly force is now "more drastically permissive of violence than the common law." *Id.* at 290.

41. N.Y. PENAL LAW § 35.30(1)(a) (McKinney 1975).

42. *See* note 31 *supra*.

43. Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1252 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

44. "The Police Foundation is a privately funded, independent, non-profit organization established by the Ford Foundation in 1970 and dedicated to supporting innovation and improvement in policing." POLICE FOUNDATION, *supra* note 2, at ii.

45. *Id.* at 45-46.

46. Federal Bureau of Investigation Memorandum 31-72, Nov. 21, 1972, *cited in* Mattis v. Schnarr, 547 F.2d at 1015.

47. Internal Regulations, Bureau of Narcotics and Dangerous Drugs, Dec. 1971, *cited in* Mattis v. Schnarr, 547 F.2d at 1016 n.18.

1974 study reported that police department regulations in a majority of the large cities of the United States allowed the firing of a weapon by an officer only when a felon presented a threat of death or serious bodily harm to someone.[48] The 1977 Police Foundation study reported that police departments in large cities have developed a "tolerant attitude" toward burglars.[49] Police department policies in five of the seven major cities that were the subject of an in-depth analysis by the Police Foundation forbid the firing of guns at fleeing burglars.[50] One rationale for the change in such policies was provided by the Chief of the Oakland, California, Police Department:

> Considering that only 7.65 percent of all adult burglars arrested and only .28 percent of all juvenile burglars arrested are eventually incarcerated, it is difficult to resist the conclusion that the use of deadly force by peace officers to apprehend burglars cannot conceivably be justified. For adults, the police would have to shoot 100 burglars in order to have captured the eight who would have gone to prison. For juveniles, the police would have to shoot 1,000 burglars in order to have captured the three who would have gone to the Youth Authority.[51]

A few police departments have gone even beyond the Model Penal Code approach[52] by forbidding the shooting of a fleeing felon solely for the purpose of apprehension, even if the crime he committed was one of violence; only if he again threatened serious harm to someone during the course of his attempt to escape could the felon be fired upon.[53] The Police Foundation report suggested a policy for police departments with outmoded, confusing, or unwritten policies which itself goes somewhat beyond the Model Penal Code rule.[54]

However, as the Police Foundation study noted, "[a] common fea-

48. Study by the Planning and Research Division of the Boston Police Department, May 3, 1974, *cited in* Mattis v. Schnarr, 547 F.2d at 1016 n.19.

49. POLICE FOUNDATION, *supra* note 2, at 49.

50. *Id.* at 50.

51. Charles R. Gain, Discharge of Firearms Policy: Effecting Justice through Administrative Regulation (unpublished), *cited in* POLICE FOUNDATION, *supra* note 2, at 46.

52. *See* note 34 *supra*.

53. POLICE FOUNDATION, *supra* note 2, at 50.

54. *Id.* at 131-33. The suggested policy is the following:

> An officer may use deadly force: I. To defend himself or herself, or another person, from what the officer reasonably perceives as an immediate threat of death or serious injury, when there is no apparent alternative. II. To apprehend an armed and dangerous subject, when alternative means of apprehension would involve a substantial risk of death or serious injury, and when the safety of innocent bystanders will not be additionally jeopardized by the officer's actions.

The authors suggest that there should be a supplemental regulation or extension of the basic policy to include the following elaboration on the basic policy:

> The principal factors which could make an armed subject so dangerous as to justify the use of deadly force under section II would be the following: (1) The subject has recently shot, shot at, killed, or attempted to kill someone, or has done so more than once in the past; (2) The subject has recently committed a serious assault on a law enforcement of-

ture of many firearms policies is that they *appear* to be more restrictive than they really are."[55] Moreover, although it may be suggested that the internal adoption of a written policy that essentially embodies the Model Penal Code rule will solve the problem of the use of deadly force by the police without court intervention, inconsistent and arbitrary enforcement of the policy would defeat such an ideal. Where disciplining is left solely in the hands of a chief of police who may not support such a policy, or where no penalties are attached to violations of the regulations, the adoption of such policies by police departments, without court interpretation that such policies are constitutionally mandated, may be only illusory.[56] Nonetheless, it is significant that the unilateral adoption of such police department regulations is the trend and is supported by citizens[57] as well as law enforcement offi-

> ficer acting in the line of duty; (3) The subject has declared that he will kill, if necessary, to avoid arrest.
>
> The subject must also be armed and appear to be capable of inflicting death or serious injury. Obviously, any person armed with a gun fits this description, unless the gun is known to be inoperable. The dangerousness of a person armed with a knife, axe, or similar weapon will depend on the feasibility of isolating the subject and on his or her proximity to other persons. It should generally be assumed that someone armed with a lesser weapon *can* be apprehended without "substantial risk of death or serious injury"; thus, deadly force will not be used, ordinarily, against such a person except to defend against an "immediate threat" as described in section I.
>
> . . . The use of deadly force is authorized against fleeing suspects if all the conditions stated above are met and the suspect is so dangerous that any future attempt at apprehension is likely to involve a substantial risk of death or serious injury to police or civilians.

55. *Id.* at 48.

56. The situation which existed in the Los Angeles Police Department may serve as an example. Although the California statute on the use of deadly force, CAL. PENAL CODE § 196 (West 1970), basically consists of the common law rule, the courts of the state have interpreted the statute's use of the word "felony" to mean a violent felony that threatened the life of another. (*See* note 25 *supra* for cases so interpreting the statute.) Furthermore, while the written policy of the Los Angeles Police Department until the fall of 1977 allowed officers to use their weapons to apprehend fleeing felons, it nonetheless suggested that discretion be used and that it was "not practical . . . [to] state with certainty that the escape of the perpetrators must be prevented at all costs." POLICE FOUNDATION, *supra* note 2, at 48. Yet, from January, 1975, through mid-1977, ninety persons had been killed by the Los Angeles police during the commission of, or attempt to escape from, an alleged crime, with at least one third of those killed unarmed. In These Times, Nov. 2-8, 1977, at 5, col. 1.

The absurdity of an incident in August, 1977, when a naked man climbing a pole was shot six times by a police officer who said the man had attacked him, prompted the Police Commission, a civilian body appointed by the mayor of Los Angeles, to force a reform of police department procedures. Among the new guidelines was one forbidding a police officer from shooting someone committing a crime only against property. Furthermore, a police officer would not be permitted to shoot at a fleeing felon unless he had committed a violent crime *and* his escape presented a substantial risk of death or serious bodily injury to others. *Id.* at 6, col. 3. However, despite these new guidelines, the police department and its chief at that time, Ed C. Davis, resisted their application with some success because the chief alone did all disciplining and no penalties were attached to the guidelines. *Id.*

57. A civilian body, for example, compelled the reform of police department deadly force procedures in Los Angeles in 1977. *See* note 56 *supra*. The numerous incidents of citizens being killed by Chicago police officers during 1977 led to extensive criticism in the local news media that included a call for the adoption of essentially the Model Penal Code approach. *See, e.g.*, Chicago

cials.[58] Legislatures and courts can no longer ignore or minimize such developments.

THE UNSETTLED COURSE OF CASE LAW

Early Rejections of the Constitutional Challenge

Direct court challenges to the constitutionality of deadly force statutes have been rare. Those few attempts to have such statutes declared invalid have usually been brought in conjunction with actions based on 42 U.S.C. § 1983,[59] as well as under the particular state's wrongful death act. Plaintiffs have generally claimed that the conduct of police constituted a violation of equal protection and a denial of due process, and inflicted a cruel and unusual punishment on the deceased.[60] Courts, however, have been reluctant to accept such arguments, rejecting them often rather summarily and without indicating in their opinions that they have given full consideration to the bases of the constitutional claims being made.

Sun-Times, Oct. 23, 1978, at 45, col. 1; Commentary by Peter Nolan on WMAQ-TV, Chicago (Oct. 18, 1978).

58. For example, in the wake of a number of incidents in 1977 and 1978 in which Chicago police officers had killed civilians, Cook County State's Attorney Bernard Carey called for a limitation on the use of "fatal force in incidents in which the safety of private citizens or law-enforcement officers is threatened. This standard has long been used by the FBI, thus avoiding many tragic incidents." Chicago Sun-Times, March 24, 1978, at 8, col. 1. *See also* Carey's remarks in Chicago Sun-Times, Aug. 24, 1977, at 10, col. 1. In addition, Thomas P. Sullivan, United States Attorney for the Northern District of Illinois, called for "a vigorous public discussion" of the Illinois statute on the use of deadly force (*see* note 29 *supra*) in which "the media, the [Illinois] legislature, and other interested parties [would] consider whether Illinois law should be changed in light of what force policemen are permitted to use." Chicago Tribune, Oct. 19, 1978, at 6, col. 1. Without taking a position on the question, Sullivan suggested that elimination of burglary as an offense justifying the use of deadly force should be considered. *Id. See also* Chicago Sun-Times, Oct. 18, 1978, at 5, col. 1.

59. 42 U.S.C. § 1983 (1970) [hereinafter cited as section 1983] provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

60. Such challenges usually have been brought by the parents of the slain person or by another claimant under the state's wrongful death statute. Plaintiffs have been found to have standing to seek a declaratory judgment that the state's deadly force statute was unconstitutional because of their vested right to bring suit for the death of their son or other relative under the state's wrongful death act. *See* Wolfer v. Thaler, 525 F.2d 977 (5th Cir.), *cert. denied*, 425 U.S. 975 (1976); Smith v. Wickline, 396 F. Supp. 555 (W.D. Okla. 1975). *But see* Jones v. Hildebrant, 550 P.2d 339 (Colo. 1976) (mother cannot bring suit under section 1983 in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action); *contra* Phillips v. Ward, 415 F. Supp. 976 (E.D. Pa. 1975). *See also* Ashcroft v. Mattis, 431 U.S. 171 (1977), in which the United States Supreme Court held that a parent does not have standing to seek a declaratory judgment that a state's deadly force statute is unconstitutional when his claim for damages under section 1983 and the state's wrongful death act has been dismissed.

The first case in which a federal court definitively ruled on the validity of a common-law-based deadly force statute was *Cunningham v. Ellington*.[61] In that case a three-judge district court panel was convened to consider only the facial constitutionality[62] of a Tennessee statute[63] codifying the common law rule and permitting police officers to use "all the necessary means" to effect the arrest of a fleeing felon. The court rejected the argument that the statute permitted the infliction of cruel and unusual punishment in violation of the eighth amendment to the United States Constitution[64] by simply stating that the statute did not deal with the type of "punishment" which falls within the scope of the eighth amendment.[65] The district court also rejected plaintiff's contention that the Tennessee statute was so unconstitutionally overbroad in its authorization of the use of deadly force as to violate such due process procedural requirements as the rights to trial by jury, to a confrontation of witnesses, and to the assistance of counsel.[66] In essence, the *Cunningham* court said that this merely restated the contention that the force used was punishment, so that "*any* exercise of force by an officer to effect an arrest for *any* offense (indeed even a simple arrest and the consequent deprivation of liberty!) would be a denial of such rights."[67] Besides, all the fleeing felon need do was submit to the arrest and he would enjoy those procedural rights. By so stating, the

61. 323 F. Supp. 1072 (W.D. Tenn. 1971).

62. Plaintiffs had brought the claims seeking a declaratory judgment that the Tennessee statute was both unconstitutional on its face and as it was applied in the instant case as a class action suit. The three-judge panel held that the suit could not be maintained as a class action because "membership in the alleged class is neither distinguishable or definable." 323 F. Supp. at 1074. Plaintiffs claimed that they represented a class consisting of those citizens of Memphis, Tennessee, who had been subjected to, were presently subject to, or who will be subjected in the future to application of the statute. Plaintiffs also sought monetary relief under section 1983 and an injunction against the enforcement and execution of the statute when the life of a police officer or others was not in danger during the suspect's attempt to flee.

63. TENN. CODE ANN. § 40-808 (1975) provides:

> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

64. *See* note 12 *supra*.

65. 323 F. Supp. at 1075. This rather summary response to an argument based on a claim of cruel and unusual punishment has been accepted by other courts. *See* Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); Mattis v. Schnarr, 547 F.2d 1007, 1020 n.32 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977). *But see* Mattis v. Schnarr, 404 F. Supp. 643, 650-51 (E.D. Mo. 1975), in which the district court discussed the merits of, and then rejected, an argument based on the eighth amendment on the assumption that use of deadly force by the police in such circumstances *can* be considered "punishment" within the meaning of the eighth amendment's use of the term. *See also* text accompanying notes 204-16 *infra*.

66. U.S. CONST. amend. VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

67. 323 F. Supp. at 1075.

Cunningham court apparently chose to ignore the critical issue of what is to be done in the actual cases in which the fleeing felon does *not* submit to arrest.

Finally, the plaintiff, relying on *Skinner v. Oklahoma*,[68] claimed that the Tennessee statute was a denial of equal protection in that it allowed deadly force to be used against fleeing felons but not against fleeing misdemeanants. The *Cunningham* court disagreed, stating that the real basis for the *Skinner* decision was that the statute at issue in that case treated persons who had committed substantially the *same* crime differently. Thus, *Skinner* did not mean that a constitutional question would be raised merely by a statute's classification of crimes.[69] Therefore, the *Cunningham* panel held that the Tennessee statute did not suffer from any of the constitutional defects placed in issue.

The following year the Court of Appeals for the Sixth Circuit, in *Beech v. Melancon*,[70] upheld a lower court ruling that the defendant police officers were justified in their use of deadly force in attempting to apprehend the plaintiff and his slain accomplice under the same Tennessee statute.[71] The Sixth Circuit noted the *Cunningham* court's declaration of the statute's constitutionality but did not itself make any judgment on the issue. Instead, the court asserted that the police officers were entitled to assume the constitutionality of the statute, for state and federal statutes are presumed constitutional until courts declare otherwise.[72]

In a concurring opinion, Judge McCree stated what apparently underlies all decisions upholding the use of deadly force by police:

> The facts of this case present an example of a situation in which courts should not second-guess police officers who, faced with mak-

68. 316 U.S. 535 (1942). An Oklahoma statute provided that upon the third conviction for a felony involving moral turpitude, a person was subject to being rendered sexually sterile (after a hearing to determine if his health would be harmed by the sterilization). The statute, however, excluded convictions for embezzlement and certain other felonies. Skinner had been convicted of stealing chickens twice and convicted of robbery twice; it was determined that he should be sterilized. The United States Supreme Court held that the statute violated the equal protection clause. Although larceny and embezzlement could be substantially the same offense under Oklahoma law, a person thrice convicted of grand larceny could be sterilized while a person thrice convicted of embezzlement could not be.

69. 316 U.S. at 540. *See* discussion of the equal protection argument in text accompanying notes 188-203 *infra*.

70. 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). Two men, one of whom died, were shot by police officers as they tried to escape after attempting to steal a safe from a gas station. The police officers had identified themselves as such and had warned the men to halt, but they did not do so. The man who survived filed a civil rights action under section 1983 against the policemen.

71. TENN. CODE ANN. § 40-808 (1975). *See* note 63 *supra* for text of statute.

72. *See* McDonald v. Board of Election, 394 U.S. 802 (1969); Davis Warehouse Co. v. Bowles, 321 U.S. 144 (1944); Davis v. Department of Labor, 317 U.S. 249 (1942).

> ing split-second decisions, reasonably and in good faith believe that their lives or those of third persons would be endangered if they refrain from employing deadly force to attempt to apprehend fleeing felons whose arrest cannot reasonably be accomplished by less dangerous means.[73]

However, Judge McCree specifically reserved judgment on the constitutionality of the Tennessee statute as applied to a situation in which it was more obvious than in the instant case that the fleeing felon had posed no threat of death or serious bodily harm to anyone either during the commission of the crime or during his attempt to escape.[74] The judge was to repeat this same concern five years later in his concurring opinion in *Wiley v. Memphis Police Department*.[75]

In *Jones v. Marshall*,[76] the next case in which the constitutionality of a deadly force statute was considered, the Court of Appeals for the Second Circuit essentially followed the reasoning of the Sixth Circuit in *Beech* and of the *Cunningham* court. The father of a sixteen-year-old boy who was slain by a police officer as the youth fled from an automobile he was suspected of stealing[77] brought a section 1983 action against the policeman. The officer asserted as a defense the Connecticut statute[78] on the exercise of deadly force by the police, which, he claimed, afforded him a privilege to use such force as long as he had a reasonable good-faith belief that that force was necessary to apprehend the fleeing felon.[79] The plaintiff, on the other hand, maintained that the

73. 465 F.2d at 426 (McCree, J., concurring).

74. *Id.*

75. 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

76. 528 F.2d 132 (2d Cir. 1975).

77. Theft of a motor vehicle was defined as a felony by Connecticut law at the time of the incident. CONN. GEN. STAT. § 53-57 (West 1972). The West Hartford, Connecticut police officer had spotted a stolen Cadillac and had followed it. After a high-speed chase, the stolen vehicle finally stopped and the occupants raced away across an open field. Without firing a warning shot or attempting any other means of apprehension, the officer fired at one of the fleeing persons and killed him. It was stipulated at the trial that neither the deceased nor his companions, who were all about sixteen years old, had been armed or had specifically threatened physical injury in any manner to the police officer or to any other person. It was further stipulated that the automobile chase had not endangered any individuals other than the occupants. As the facts indicate, the dead youth and his two companions were more probably guilty of joyriding, a misdemeanor, than of auto theft. Neither of the decedent's companions was charged with a felony; the charge against one was ultimately dropped, and the other boy received a suspended sentence after a guilty plea to the misdemeanor.

78. CONN. GEN. STAT. § 53a-22 (West 1972) provides in pertinent part:

> A peace officer . . . is justified in using deadly physical force upon another person . . . only when he reasonably believes that such is necessary to: (1) Defend himself or a third person from the use or imminent use of deadly physical force; or (2) effect an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony.

79. An earlier case in the Connecticut state courts had declared that the common law privilege and the use of deadly force under such circumstances to be constitutional. *See* Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964).

Police officers have commonly asserted good-faith reliance on the constitutionality of the

Connecticut statute should not be applied; rather, the court should formulate its own federal law of privilege which, the plaintiff claimed, should be the Model Penal Code rule[80] on the use of deadly force. Under such a rule, the police officer could assert the statute as a defense only if he had believed at the time of the killing that the felon had himself used or threatened to use deadly force in the commission of the felony or that there was a substantial risk that he would use such force if not immediately apprehended.[81]

However, the district court held that since the state rule was constitutional as construed by Connecticut state courts, that was the rule which should control the case.[82] The fact that the Connecticut legislature had recently reexamined and approved of the common law rule[83] was strong evidence to the district court that:

> the common law rule is not one which is generally regarded as so shocking to the conscience as to violate the Constitution. While *there is no doubt that a contrary view exists and indeed has much to support it*, it is not the prerogative of this Court to judge the constitutionality of state laws on policy grounds alone. . . .[84]

On appeal to the Second Circuit, the plaintiff in *Jones* again ar-

particular state's deadly force statute as a defense in civil rights actions against them. Courts have held that federal rather than state law should apply and should determine the adequacy of defenses asserted in section 1983 actions. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975); Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974). Yet, although not bound by the state deadly force statutes, federal courts have generally made the state law the rule to apply to the case. *See, e.g.*, Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975).

Occasionally, however, a court has stated that it would not allow such a privilege and defense if it "were writing on a blank slate." *See* Qualls v. Parrish, 534 F.2d 690, 694 (6th Cir. 1976). *See also* Cunningham v. Ellington, 323 F. Supp. 1072, 1075 (W.D. Tenn. 1971). The principal reason enunciated by courts for deferring to state law is that "a decision to the contrary would be unfair to an officer who relied, in good faith, upon the settled law of his state that relieved him from liability for the particular acts performed in his official capacity." Qualls v. Parrish, 534 F.2d 690, 694 (6th Cir. 1976). *See also* Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.) (McCree, J., concurring), *cert. denied*, 434 U.S. 822 (1977); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974); Note, *Police Officer Who Shoots Fleeing Felon Protected From 42 U.S.C. § 1983 Action by State Privilege Rule*, 10 SUFFOLK U.L. REV. 1294 (1976).

80. MODEL PENAL CODE § 3.07 (Proposed Official Draft, 1962). *See* note 34 *supra*.

81. *Id.*

82. The Supreme Court has stated that section 1983 "should be read against the background of tort liability," Monroe v. Pape, 365 U.S. 167, 187 (1961), and has found that a defense which is part of that background is also a defense under section 1983, Pierson v. Ray, 386 U.S. 547, 555 (1967). This led in part to the *Jones* district court's rejection of the request to formulate a new federal privilege.

83. *See* note 79 *supra*. Such recent reevaluation and approval of the common law rule by the legislature was also to be emphasized in the dissenting opinion of Mattis v. Schnarr, 547 F.2d 1007, 1021 (8th Cir. 1976) (Gibson, C.J., dissenting), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

84. 383 F. Supp. 358, 362 (D. Conn. 1974) (emphasis added).

gued that the Model Penal Code rule should be adopted as the federal rule in a section 1983 action in lieu of the state statute. He also contended that the state statute lacked logical support, was historically outmoded, had been uniformly disapproved by legal scholars,[85] and, most damaging of all, violated the due process clause of the fourteenth amendment. The plaintiff argued that, "procedurally speaking, [the statute] permits the arbitrary imposition of death by the officer, violates the presumption of innocence, and denies the suspect a right to trial by jury."[86] However, the Second Circuit summarily dismissed such arguments as being of little value in trying to replace the common law concept with the Model Penal Code rule. Each argument, said the court, could apply equally to the provisions of the Model Penal Code, which the plaintiff claimed were constitutional.[87] Specifically, in accordance with the Model Penal Code, a policeman could use deadly force in attempting to arrest a fleeing felon who had used deadly force himself in the commission of the crime. Yet, according to the Second Circuit, such a killing would be equally arbitrary and just as surely would deprive the fleeing felon of his life without affording him procedural due process as would a policeman's use of deadly force under the common law or under the Connecticut deadly force statute.[88] The court declared that the plaintiff, by urging the application of a rule as arguably violative of due process as the one he claimed was unconstitutional, had thereby conceded his arguments based on a denial of procedural due process.[89] Such cavalier treatment of the plaintiff's due process claims neglects the fact that *arguably* the Model Penal Code provisions are indeed constitutional, being nonarbitrary and protective of due process concerns.

Finally, in the winter of 1976-77, the two most recent cases in which the constitutionality of a state's deadly force statute was determined resulted in a direct clash of the circuit courts of appeals. In *Mattis v. Schnarr*,[90] the Eighth Circuit became the first court to hold that a state's deadly force statute codifying the common law rule was uncon-

85. *See also* Mattis v. Schnarr, 547 F.2d at 1011-12 n.7.

86. Jones v. Marshall, 528 F.2d at 136 n.9. These arguments were to form the basis of much of the *Mattis* court's reasoning that the Missouri statutes indeed do violate due process.

87. *Id.*

88. *Id.*

89. *See* Note, *Police Officer Who Shoots Fleeing Felon Protected from 42 U.S.C. § 1983 Action by State Privilege Rule*, 10 SUFFOLK U.L. REV. 1294 (1976), in which the author concludes that the *Jones* court, by failing to adequately distinguish between the question of privilege and that of immunity from liability for the police officer, ignored the real issue of the constitutionality of the statute and instead complicated the law governing suits arising under section 1983.

90. 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

stitutional. Two months later, however, the Sixth Circuit, in *Wiley v. Memphis Police Department*,[91] specifically rejected the Eighth Circuit's reasoning in upholding the validity of a similar statute.

Mattis v. Schnarr

In *Mattis*, the father of an eighteen-year-old boy who had been shot in the head and killed by a policeman when the boy fled after burglarizing an unoccupied office[92] brought a civil rights action against two police officers. He alleged that the officers had deprived his son of his life without due process of law, had deprived him of the equal protection of the laws, and had inflicted a cruel and unusual punishment on him.[93] Furthermore, the plaintiff asked the court to declare unconstitutional the two Missouri statutes[94] authorizing a police officer's use of deadly force in arresting a fleeing felon.[95]

The district court held[96] that the defenses of good faith and probable cause were available to the policemen, for they had acted in reliance upon the constitutionality of the Missouri statutes. The court, therefore, dismissed the action, concluding that no justiciable issue was present which permitted declaratory relief.[97] However, the Court of Appeals for the Eighth Circuit reversed,[98] holding that while the trial court's finding was correct in regard to dismissing the action for dam-

91. 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

92. Eighteen-year-old Michael Mattis and his seventeen-year-old companion entered the office of a golf driving range at night through an unlocked window. The youths were discovered in the office by a police officer. They attempted to escape through the back window and, ignoring the policeman's order to stop, ran off as the officer fired a shot at them. Another officer arrived on the scene and caught Mattis, but the boy broke away. The officer shouted to Mattis to stop or he would shoot, but the youth did not halt. The police officer fired one shot at Mattis, which struck the boy in the head and killed him. Both officers believed that firing their guns at the youths was reasonably necessary to prevent their escape and to effect their arrest, and that such use of their weapons was authorized by valid Missouri statutes.

93. The action was brought under both section 1983 and the Missouri Wrongful Death Act, MO. ANN. STAT. § 537.080 (Vernon 1969), and it claimed violations of the eighth, ninth, and fourteenth amendments to the United States Constitution.

94. MO. ANN. STAT. § 559.040 (Vernon 1969) provides in pertinent part:

> Homicide shall be deemed justifiable when committed by any person in either of the following cases: . . . (3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully . . . keeping or preserving the peace.

MO. ANN. STAT. § 544.190 (Vernon 1969) states:

> If, after notice of the intention to arrest the defendent, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

95. The plaintiff, who asked for nominal damages of $100, was assisted in his representation by the American Civil Liberties Union. The dissenters in the first *Mattis* appeal to the Eighth Circuit cited the ACLU's involvement as a prime reason why the Attorney General of Missouri should be allowed to intervene on the defendant police officers' behalf on remand.

96. Mattis v. Kissling, Civil No. 72-Civ. (3) (E.D. Mo., filed Jan. 16, 1973).

97. The district court also reversed its original decision that the father had standing to bring the action under section 1983 when it denied the plaintiff's motion for a new trial.

98. Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974).

ages, good faith and probable cause were *not* available as defenses to the action insofar as declaratory relief was concerned, and that declaratory relief is not dependent upon a showing that the plaintiff is entitled to monetary relief.[99] The court of appeals remanded the case to the district court solely to determine whether the Missouri statutes in question should be declared unconstitutional.

The plaintiff made no claim that the statutes were unconstitutional insofar as they allowed police officers to use deadly force where reasonably necessary in order to arrest a fleeing felon who had used, or had threatened to use, deadly force in the commission of the crime; nor were the statutes challenged as to their permitting deadly force to be used to apprehend a fleeing felon whom the officers believed would seriously harm them or others if he were not immediately apprehended.[100] Rather, the claim was that the statutes were unconstitutional insofar as they authorized the use of deadly force against fleeing persons believed to have committed, or to have attempted to commit, a nonviolent felony[101] when the police officers have no reasonable belief that the fleeing felon will use deadly force against them or another citizen.

With this single issue before it, the district court rejected the plaintiff's arguments based on due process, equal protection, and cruel and

99. The Eighth Circuit also held that Michael Mattis' father did indeed have standing under section 1983. However, the fact that the denial of damages by the district court was unchallenged by the plaintiff on appeal formed the basis for the United States Supreme Court's refusal to consider the merits of the Eighth Circuit's finding that the Missouri statutes were unconstitutional. Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam). The Supreme Court stated that the suit did not present a live case or controversy; there was no longer any possible basis for a damage claim, for the issue had been decided by the district court and had gone unchallenged on appeal. In regard to the request for a declaratory judgment on the statutes' constitutionality, the Court stated that there must be "a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.' Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 242 (1937)." 431 U.S. at 172. The Court declared that no "present right" of the plaintiff was at stake, for the only question left to be decided was whether the police officers would have been liable *if* the defense of good faith had not been available to them. Thus, the judgment of the Eighth Circuit was vacated with instructions to the district court to dismiss the only remaining complaint, the request for the declaratory judgment.

A year later, however, the Eighth Circuit reaffirmed what it termed the "jurisdictional holding" of *Mattis* in a case in which it reversed the district court and remanded for a new trial a civil rights action in which damages were sought by the mother of a man shot to death by Omaha, Nebraska police officers as he fled from the scene of a burglary. "The right to life is fundamental and is protected against unreasonable or unlawful takings by the procedural due process safeguards of the fifth and fourteenth amendments." Landrum v. Moats, 576 F.2d 1320, 1325 (8th Cir.), *cert. denied*, 99 S. Ct. 282 (1978).

100. Thus, the provisions of the Model Penal Code regarding the use of deadly force by the police were implicitly regarded as constitutional by the plaintiff. *See* note 34 *supra*.

101. "Nonviolent felony" here includes all felonies except homicide, forcible rape, robbery, and aggravated assault—the Federal Bureau of Investigation classifications. *See* Mattis v. Schnarr, 547 F.2d at 1011 n.6.

unusual punishment grounds and found the statutes constitutionally valid.[102] The court held that the statutes did not violate the fourteenth amendment's due process clause because the father's claim—that his parental right to raise a family continues unless and until terminated by due process of law—must yield in a balancing test to the overriding interest of the state in assisting policemen in fulfilling their duty to apprehend criminals and protect society, as had been determined by the state legislature.[103] The court stated that perfect statutes are impossible to draft.[104] Nonetheless, it is the legislature's duty, not the judiciary's, to choose among the various imperfect alternatives. Since the Missouri statutes' classification as to whom the police can direct deadly force against was as reasonable and as free of arbitrariness as any other proposed alternative, the court found no equal protection violation.[105] Finally, because the use of deadly force authorized by the statutes did not offend any fundamental principle of justice or exceed the boundaries of civilized conduct,[106] the district court held that the statutes did not violate the eighth amendment.[107]

Disagreeing, the Court of Appeals for the Eighth Circuit declared the Missouri statutes unconstitutional.[108] Its decision was based primarily on a combination of substantive due process and changing public policy considerations. The Eighth Circuit focused its decision on what it termed the *fundamental* right to life of an individual, which right is protected by the due process clauses of the fifth and fourteenth amendments.[109]

However, the Eighth Circuit recognized that there are some situations in which the state's interest is so compelling that the state may take life without affording the individual the full protection of due process.[110] Those situations are to be determined by balancing the in-

102. 404 F. Supp. 643 (E.D. Mo. 1975).

103. *Id.* at 647.

104. *Id.* at 650.

105. *Id.* at 649-50. Thus, the district court essentially echoed the reasoning of the Second Circuit in Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975), in which it rejected the plaintiff's due process argument. *See* text accompanying notes 86-89 *supra*.

106. 404 F. Supp. at 650.

107. *Id.*

108. 547 F.2d at 1017.

109. *Id.* The Eighth Circuit cited the following cases in support of its belief that the right to life is indeed fundamental: Roe v. Wade, 410 U.S. 113, 157 (1973); Screws v. United States, 325 U.S. 91, 123 (1945) (Rutledge, J., concurring); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

110. 547 F.2d at 1018. The court specifically referred to the 1976 United States Supreme Court decisions upholding the constitutionality of certain state "death penalty" statutes: Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

terest of society in guaranteeing a person's right to life against the interest of society in insuring the public safety. In contrast to the district court, however, which stated that it is *solely* the prerogative of the legislature to determine how that balance should be struck,[111] the Eighth Circuit asserted that it is the judiciary which has the ultimate responsibility of determining whether the balance struck is constitutional.[112] Because a fundamental right was at issue, the state had the burden of demonstrating that an interest existed which at least was equivalent to the right to life in order to justify the use of deadly force against fleeing felons who have neither used nor threatened to use deadly force against another. But, the court stated, no such demonstration had been made. Rather, the Missouri statutes created "a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and of the general public,"[113] a presumption which was obviously incorrect as applied to the facts of the *Mattis* case and which, according to the court, had never been factually demonstrated to be true.

The Eighth Circuit noted that "[f]elonies are infinite in their complexity, ranging from the violent to the victimless,"[114] and that policemen cannot be constitutionally vested with the authority to kill every fleeing felon without regard to the specific crime committed. The court cautioned that police officers must be required to use reasonable and enlightened professional judgment while always remaining aware that "death is the ultimate weapon of last resort, to be employed only in situations presenting the gravest threat to either the officer or the public at large."[115]

In addition, the Eighth Circuit considered the historical foundation for the common law rule,[116] the statutes of other jurisdictions and the Model Penal Code,[117] and scholarly opinion over the last fifty years.[118] It examined at length the recommendations of the President's Commission on Law Enforcement and Administration of Justice[119] and of the National Commission on Reform of Federal Criminal Laws.[120] It discussed the Federal Bureau of Investigation's policy on the use of firearms[121] as well as the policies of a number of other law enforcement

111. 404 F. Supp. at 651.
112. 547 F.2d at 1019.
113. *Id.*
114. *Id.* at 1020.
115. *Id.*
116. *Id.* at 1011 n.7.
117. *Id.* at 1012-13.
118. *Id.* at 1011 n.7, 1014-16.
119. *Id.* at 1014.
120. *Id.* at 1013 n.13.
121. *Id.* at 1015-16.

agencies.[122] After considering all such information, the Eighth Circuit concluded:

> [T]he historical basis for permitting the use of deadly force by law enforcement officers against nonviolent fleeing felons has been substantially eroded, that federal and many state and local law enforcement agencies prohibit the use of deadly force against such felons except where human life is threatened, and that the policy of permitting deadly force to be used against all fleeing felons contributes little or nothing to public safety or the deterrence of crime.[123]

Finally, the court delineated a statute which, in its opinion, would be constitutional: the use of deadly force by law enforcement officers in the apprehension of fleeing felons should be limited to situations:

> where the officer has a warrant or probable cause to arrest the felon where the felon could not be otherwise apprehended and *where the felon had used deadly force* in the commission of the felony, or the officer reasonably believed the felon would use deadly force against the officer or others if not immediately apprehended.[124]

The dissenting opinion in *Mattis*, concurred in by three of the seven judges, emphasized that it is the function of the legislature, not the judiciary, to modify state statutes rooted in common law which involve questions of public policy.[125] It chided the majority for showing no interest in the contrary opinions of other courts and pointed out that there exists no other instance in which the common law rule on the use of deadly force, either codified or uncodified, has been invalidated by a court, either state or federal.[126] The dissent noted that the majority was suggesting a modified version of the Model Penal Code as a constitutional statute, while ignoring the fact that the Model Penal Code as a whole was a proposal for legislative, not judicial, modification of the common law. Furthermore, only one year earlier the Missouri legislature had rejected any amendment to the state's criminal code based on the Model Penal Code.[127]

Wiley v. Memphis Police Department

Soon after the *Mattis* decision was rendered, the United States Court of Appeals for the Sixth Circuit adhered to the reasoning of the

122. *Id.* at 1016 nn.18-19.

123. *Id.* at 1016. *See also* text accompanying notes 39-54 *supra*.

124. *Id.* at 1020 (emphasis added). This is stricter than the Model Penal Code rule which allows the use of deadly force if the fleeing felon had only threatened to use deadly force himself against his victim, even if he did not actually use it. *See* note 34 *supra*.

125. *Id.* at 1021-22 (Gibson, C.J., dissenting).

126. *Id.* at 1022. However, California state courts have construed that state's deadly force statute, a codification of the common law rule, in a manner equivalent to the suggested constitutional rule of the *Mattis* majority. *See* note 25 *supra*.

127. *Id.*

courts in *Cunningham v. Ellington*[128] and *Beech v. Melancon*[129] by affirming a district court's holding that the Tennessee statute[130] on the use of deadly force was constitutional.[131] In *Wiley v. Memphis Police Department*[132] the mother of a sixteen-year-old boy slain by police officers[133] initiated a civil rights and wrongful death action and sought a declaratory judgment that the Tennessee statute was unconstitutional.[134] The district court, however, relied on *Cunningham*, which had upheld the statute's constitutionality. The court found that the officers were justified in relying on the statute and in employing "the only practicable means available to them under . . . circumstances requiring split second judgment to prevent the deliberate attempt to escape of one caught in the midst of a felonious burglary."[135]

In affirming the district court's decision, the Sixth Circuit also deferred to the *Cunningham* reasoning in rejecting the plaintiff's claims that the police officers had deprived her son of due process and had inflicted a cruel and unusual punishment on him.[136] The Sixth Circuit harshly criticized the Eighth Circuit's *Mattis* decision.[137] It chided the

128. 323 F. Supp. 1072 (W.D. Tenn. 1971).

129. 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

130. TENN. CODE ANN. § 40-808 (1975). *See* note 63 *supra* for text of this statute.

131. The Tennessee statute is essentially identical to the Missouri laws at issue in *Mattis*. MO. ANN. STAT. §§ 544.190, 559.040 (Vernon 1969). *See* note 94 *supra* for text of these statutes.

132. 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

133. Three Memphis policemen spotted three black youths inside a sporting goods store at night. Two of the boys raced from the store into a large ditch nearby. Although the officers repeatedly warned them to stop, the youths kept running. Two of the policemen fired their guns. Plaintiff's son was critically wounded and later died. The second youth later surrendered at police headquarters, and the third was captured when he was found hiding inside the sporting goods store. Shotguns taken from the store were subsequently found in the ditch in which plaintiff's son was killed.

134. *Id.* at 1248-49. The cause of action was brought under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, and under the fourth, fifth, sixth, eighth, thirteenth, and fourteenth amendments to the Constitution. *Id.* at 1248.

135. *Id.* at 1250 (quoting the district court's memorandum opinion).

136. *See* text accompanying notes 64-67 *supra*. An equal protection challenge was also made in *Wiley* upon the basis of a disproportionate use of deadly force against non-white suspects. That argument was rejected by the Sixth Circuit, in part because, based on Washington v. Davis, 426 U.S. 229 (1976), a racially disproportionate impact is not sufficient to overturn a state statute without proof of a racially discriminatory purpose. Wiley v. Memphis Police Dep't, 548 F.2d at 1254. *See also* Mattis v. Schnarr, 547 F.2d at 1014 n.15, for some statistical information on the shootings of non-white suspects by the police.

137. The *Wiley* court was so eager to point out what it considered errors in the *Mattis* majority opinion that it neglected to be wary of making errors of its own. The Sixth Circuit, in referring to the *Mattis* majority, asserted: "It even erroneously stated 528 F.2d 141 n.21 that the Court in *Wolfer v. Thaler* had held that the parents did not have standing to sue despite the statement in *Wolfer* . . . that the parents did have standing." 548 F.2d at 1252. Unfortunately, that statement by the *Wiley* court was itself erroneous. The citation given is not to the *Mattis* opinion but to *Jones v. Marshall*, and neither the *Jones* decision nor the *Mattis* decision includes that erroneous statement. The Eighth Circuit, in fact, reported the *Wolfer* holding correctly in its *Mattis* opinion, 547 F.2d at 1017 n.21.

Eighth Circuit for rejecting *Cunningham, Beech, Jones v. Marshall*,[138] and the decision of the *Wiley* district court, and for "embarking on a new course which should have been left to the state legislatures where it belongs."[139] It denounced the Eighth Circuit for ignoring the "fact" that such deadly force statutes are "necessary even to elementary law enforcement."[140]

One significant difference in the facts of *Mattis* and *Wiley* may well make the cases distinguishable. In *Wiley*, the youth who was slain was fleeing from a sporting goods store in which guns and ammunition were available, not from a comparatively innocuous golf driving range office as in *Mattis*. The Memphis police officers had a basis for reasonably believing their lives might be endangered by the fleeing youth. Evidence at the trial indicated that stolen weapons were actually found near the body of the boy who was killed. Judge McCree, who had withheld judgment on the constitutionality of the Tennessee statute in *Beech v. Melancon*,[141] also wrote a separate concurring opinion in *Wiley* in which he emphasized that his decision was based solely on the fact that the officers could reasonably believe that the fleeing felon presented an apparent threat to human life and that the case did not require the court to decide the validity of the Tennessee statute.[142]

The Vitality of the Constitutional Attack

The foregoing cases illustrate the major arguments advanced in challenging the constitutional validity of common-law-based deadly force statutes. Other than in the *Mattis* decision, the courts have responded by rejecting such arguments. However, the cursory treatment often given such constitutional claims, especially in light of the Eighth Circuit's decision in *Mattis*, does not weaken the theory that a major constitutional assault can still be made on such statutes and can succeed.

A Task for the Courts, Not Just the Legislatures

The first obstacle to be overcome is the courts' deference to the

138. 528 F.2d 132 (2d Cir. 1975).

139. 548 F.2d at 1252.

140. *Id.* In doing so, however, the Sixth Circuit overlooked the *fact* that a great number of law enforcement agencies and departments throughout the country reject such a use of deadly force and do not find it "necessary." *See also* text accompanying notes 43-54 *supra* and Mattis v. Schnarr, 547 F.2d at 1013-16.

141. 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). *See* text accompanying note 74 *supra*.

142. 548 F.2d at 1256 (McCree, J., concurring).

legislatures as the governmental bodies charged with the task of creating and modifying deadly force statutes. In ruling on the constitutionality of the various laws, courts have indicated that if they "were writing on a blank slate,"[143] they would limit the privilege of police officers to use deadly force to those situations condoned by the Model Penal Code's proposed rule, namely, instances in which the felon caused or threatened the death of, or serious bodily injury to, a citizen, or in which there was a substantial risk that the fleeing felon would cause or threaten such serious harm if his apprehension were delayed.[144] When a federal district court[145] in Memphis suggested that the Tennessee legislature should reexamine the policy behind its common-law-based statute because "as a matter of value judgment it [may well] be better to allow persons thought to be felons to escape than to incur the risk of killing them,"[146] that court was merely repeating the admonition given the Tennessee legislature by the Tennessee Supreme Court nearly one hundred years earlier.[147] However, despite such apparent beliefs by courts that the common law rule is wrong, and despite the lethargic reaction or outright hostility of many state legislatures to any change in that rule, courts generally have declared that they will not themselves "legislate" in this regard.[148]

Nonetheless, the reality is that courts have indeed been legislating in this area. Quite often a state's statute permitting the use of deadly force against a fleeing criminal makes no distinction between fleeing felons and fleeing misdemeanants.[149] Yet courts throughout the country have invariably construed such statutes, which appear on their face to refer to *all* criminals, as being applicable to felons only, thus following the common law rule.[150] Such a major restriction on a law may indeed be termed "legislating," yet courts have exhibited little reluctance to do so.[151] As the plaintiff argued in his appeal to the Eighth

143. Qualls v. Parrish, 534 F.2d 690, 694 (6th Cir. 1976).

144. *Id.*; Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

145. Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971).

146. *Id.* at 1075.

147. Reneau v. State, 70 Tenn. 720 (1879). *See* note 26 *supra*.

148. *See, e.g.*, Wiley v. Memphis Police Dep't, 548 F.2d at 1247. The *Wiley* majority stated: "We agree with the dissent in the Eighth Circuit case (*Mattis v. Schnarr*), which was highly critical of the majority opinion for not following the decisions of other Circuits and for embarking on a new course which should have been left to the state legislatures where it belongs." *Id.* at 1252.

149. *See, e.g.*, TENN. CODE ANN. § 40-808 (1975) and MO. ANN. STAT. §§ 544.190, 559.040 (Vernon 1969). *See* notes 63 and 94 *supra* for the text of the statutes.

150. *See, e.g.*, Manson v. Wabash R.R., 338 S.W.2d 54 (Mo. 1960); People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922); Reneau v. State, 70 Tenn. 720 (1879).

151. Indeed, the willingness of courts to make such a modification of the law may be due to the existence of a model in the common law. Nevertheless, such a modification can certainly be

Circuit in *Mattis*:

> [w]hen a court, for the purpose of removing some ancient barbarity, modifies the common law, reads a statute to mean other than what it says, imposes considerations of public policy, or strikes down a statute under one of the seminal provisions of the Constitution, the result is all the same, and these are all time-honored practices of American courts.[152]

The Sixth Circuit in *Wiley* was highly critical of the Eighth Circuit "for embarking on a new course which should have been left to the state legislatures where it belongs."[153] But the Eighth Circuit in *Mattis* realized that it is not an adequate response to a question concerning the validity of the killing of a nonviolent, nonthreatening fleeing felon merely to say that it is a judgment for the legislature. Rather, the Eighth Circuit recognized that those state legislatures which refuse to modify or even consider a change in their common-law-based deadly force statutes are ignoring the fact that there must be "changing concepts as to minimum standards of fairness"[154] and decency and humanity in the field of criminal justice, and that courts are required to re-evaluate those standards.[155] Indeed, in light of the evolving policies of many federal and local law enforcement agencies,[156] the overwhelming opinion of legal scholars that the common law rule is no longer valid,[157] the increasing concern of the general public,[158] as well as the fact that many state legislatures have already adopted the Model Penal Code rule or have greatly restricted the common law use of deadly force,[159] those states that still adhere to the common law rule are ignoring the changed perceptions of standards of decency in the criminal field. As the *Mattis* court indicated, the judiciary cannot abdicate its

called "legislating," for the state legislatures, when enacting such statutes, had the option of explicitly delineating the common law felon-misdemeanant distinction.

152. Appellant's Brief at 13, Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

153. 548 F.2d at 1252.

154. Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting), *cited in* United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844, 862-63 (2d Cir. 1965).

155. *See, e.g.*, Justice Frankfurter's opinion on the necessity of evolving standards of fundamental fairness in determining the meaning and scope of the due process clause in Rochin v. California, 342 U.S. 165, 169-71 (1952); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466-67 (1947) (Frankfurter, J., concurring); Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

156. *See* text accompanying notes 43-54 *supra*.

157. *See* Mattis v. Schnarr, 547 F.2d 1007, 1011-12 n.7 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

158. *See* notes 56-57 *supra*. Also, as the superintendent of the Chicago Police Department, James O'Grady, stated, citizens are constantly concerned with the use of deadly force by police officers, thereby demanding continuous review of their policies by responsible police officials. Interview of James O'Grady on WMAQ-TV, Chicago (Apr. 20, 1978).

159. *See* notes 27-36 *supra* and accompanying text.

function of ensuring that the individual is accorded that fair, decent, and humane treatment that is his constitutional right[160] by deferring to an unresponsive legislature.

The Due Process Argument

With that obstacle hurdled, a court considering the constitutionality of a common law form of deadly force statute may find possible bases for striking down such a law in the due process and equal protection clauses of the fourteenth amendment as well as in the eighth and fourth amendments. The *Mattis* court, in resting its decision on a combination of substantive and procedural due process arguments, indicated the best initial approach. Courts admittedly hesitate to base a decision regarding a constitutional question on the somewhat disfavored doctrine of substantive due process.[161] The Eighth Circuit in *Mattis* certainly avoided use of such terminology and throughout its opinion mingled elements of procedural due process in discussing the deprivation of a fleeing felon's right to trial.[162] Yet, unlike other courts which have evaluated deadly force statutes, the *Mattis* court recognized

160. *See* text accompanying notes 163-65 *infra*.

161. The doctrine of substantive due process, once favored as the means of scrutinizing state economic regulations (*e.g.*, Lochner v. New York, 198 U.S. 45 (1905)), has been generally discredited since the 1930's for its alleged encroachment on legislative powers. However, the doctrine has been resurrected in recent years to strike down laws infringing on the individual's personal autonomy, primarily in the areas of marital and sexual privacy. *See* Carey v. Population Services Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring); 381 U.S. at 499 (Harlan, J., concurring); 381 U.S. at 502 (White, J., concurring). *See also* Justice Stewart's concurring opinion in Zablocki v. Redhail, 334 U.S. 374, 391 (1978), in which he rejected the majority's use of an equal protection analysis to strike down a Wisconsin law. That law prohibited any state resident who had minor children not in his custody but whom he was under a legal obligation to support from marrying without a court approval order. Such approval would be granted only upon a showing that the support obligation had been met and that children covered by the support order were not then nor were likely thereafter to become public charges. Justice Stewart instead favored a substantive due process analysis to achieve the same result. He stated that the statute was invalid because it encroached upon a liberty interest protected by the due process clause, *i.e.*, the right to marry. He stated that while:

> [t]he Court is understandably reluctant to rely on substantive due process . . . , [t]o conceal this appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.

Id. at 395-96.

In addition, *see* Appellant's Brief at 10, Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977):

> If this means that we now have substantive due process with respect to certain personal rights, then so be it. Since the abortion case of *Roe v. Wade*, 410 U.S. 113 . . . (1973) it can no longer be seriously denied that there is such a thing as substantive due process, even though some of the justices still shy away from so describing it. . . .

162. For an argument that common-law-based deadly force statutes can be invalidated on procedural due process grounds, *see Deadly Force to Arrest*, *supra* note 21, at 385-88.

that the main issue is the deprivation of another *fundamental* right—the right to life. Courts have seldom dealt with this first of the trilogy of rights safeguarded by the due process clauses,[163] and indeed it may be argued that the United States Supreme Court has not directly and explicitly held that the right to life is "fundamental."[164] Nonetheless, the Court has sufficiently supported the doctrine and referred to a "fundamental" right to life[165] often enough so that it is not reckless to claim that life is indeed a fundamental right.

If that proposition is accepted, then the state has the burden of proving the existence of a *compelling* governmental interest in order to sustain legislation which infringes on that fundamental right to life. Furthermore, the state has the additional burden of proving both that the legislation is a necessary means to achieve that state interest and that it is the least restrictive method of all possible alternatives.[166] As expressed in *Roe v. Wade*,[167] the state must prove that the legislative enactment has been "narrowly drawn to express only the legitimate state interests at stake."[168]

In applying such a test, there are several possible governmental interests that must be weighed against the fleeing felon's right to life. The first of these, of course, is the protection of the general public. If the fleeing felon has caused or threatened serious bodily harm to a person in the commission of his crime, or if there is a substantial risk that he will do so in his attempt to flee from the police, then, as the Model Penal Code provisions acknowledge, the rights of the citizens or police officers may indeed supersede the suspect's right to life.[169] But there is

163. U.S. CONST. amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV § 1 provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

164. Rights explicitly termed "fundamental" by the Supreme Court have been the right to vote, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942).

165. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("the fundamental human rights of life and liberty"). *See also* Roe v. Wade, 410 U.S. 113, 157 (1973); Screws v. United States, 325 U.S. 91, 123 (1945) (Rutledge, J., concurring); 325 U.S. at 134-35 (Murphy, J., dissenting); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

166. Although this test of "strict scrutiny" of a state law is generally applied by a court when considering whether the law violates the equal protection clause, the test is also applicable in cases involving fundamental rights protected by the due process clause. *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678, 684-86 (1977); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

167. 410 U.S. 113 (1973).

168. *Id.* at 155.

169. It may be argued, however, that there is no compelling state interest in killing the suspect even if he himself *has* already killed someone unless there is also a substantial likelihood that he will kill again in an attempt to escape. The Kentucky deadly force statute apparently reflects such reasoning. *See* note 36 *supra* and accompanying text.

no such compelling state interest when the fleeing felon had neither used nor threatened to use serious violence against another either in the commission of the crime or during his attempted escape. Nor can it be said that protection of property is a state interest which can supersede a person's fundamental right to life. It also cannot be argued that the state has an overriding interest in preventing future crimes from being committed by this fleeing felon, for it is but mere speculation that the suspect will commit future crimes—or, more accurately, future crimes involving serious personal violence. Indeed, both the common law and most state statutes forbid the use of deadly force in attempting to stop a person from committing a crime,[170] particularly one involving property only.

Similarly, an argument can be made that the state's overriding interest is one of deterrence, either to deter felons in general from committing crimes or to deter those who do commit a crime from fleeing arrest through the fear that deadly force will be employed. However, as Justice Marshall has noted in his opinions in Supreme Court cases considering the validity of some capital punishment statutes,[171] there are no decisive conclusions that can be drawn regarding the value of the death penalty as a deterrent to committing crime. It may thus be inferred that inflicting the penalty of death on a fleeing felon would similarly be of doubtful utility as a deterrent to future felons. Indeed, what statistical evidence is available indicates little, if any, connection between statutes forbidding the use of deadly force in situations not involving serious violence and an increase in crime.[172] Furthermore, there can be no compelling state interest in using deadly force to deter felons from fleeing arrest.[173] The inherently speculative nature of such an asserted interest cannot make it compelling. Indeed, experiences of various police departments with the use of warning shots prior to shooting at a fleeing suspect indicate that the threat of police using deadly force has little, if any, effect on deterring the flight of suspects from arrest.[174]

170. *See* text accompanying notes 180-84 *infra*.

171. *See* Gregg v. Georgia, 428 U.S. 153, 233-36 (1976) (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 347-54 (1972) (Marshall, J., concurring).

172. *See* Tsimbinos, *supra* note 21, at 19-20.

173. Some courts have erroneously referred to similar arguments against deadly force statutes as arguments for a right to flee. *See* Mattis v. Schnarr, 404 F. Supp. 643, 650 (E.D. Mo. 1975); Cunningham v. Ellington, 323 F. Supp. 1072, 1075 (W.D. Tenn. 1971).

174. The use of warning shots as an aid in the apprehension of fleeing suspects and as a precondition to the use of deadly force was abandoned by the Memphis, Tennessee, Police Department in 1969 because analysis of the situation in Memphis and other cities showed that warning shots have no effect on fleeing suspects and may in fact cause some to flee all the faster. The risk of injuring innocent bystanders was too great to continue such an ineffective policy, thus resulting in a ban on the use of warning shots. *See* Brief for Appellant at 58, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 454 U.S. 822 (1977).

However, even if it were assumed that the state's interest in the deterrence of flight by felons through fear of death can be compelling, the killing of fleeing felons is not a necessary means of achieving that objective—it is not the method of attaining that end which least burdens the felon's fundamental right to life. Rather than killing fleeing suspects in order to deter others from fleeing from arrest, the act of fleeing from apprehension could instead have a serious criminal penalty attached to it. The state legislature could create a separate crime of attempted evasion of arrest whereby a felon who fled could be charged with and convicted of this additional crime and subjected to another penal sentence besides that imposed for the original crime. Instead of allowing police officers to kill fleeing suspects in order to deter hypothetical others from such flight, state legislatures should make such provisions for the fair and orderly prosecution of one who fled from apprehension.[175] Such an additional penalty would not be any more unlikely than the use of deadly force to achieve the presumed state's interest of deterrence of suspects' flight from arrest.[176] A similar suggestion was offered by a Louisiana federal district court in *Sauls v. Hutto*:[177] "Nor is the need to deter resistance to arrest a sufficient justification for the use of deadly force. If this be society's concern, then resisting arrest itself should be made a serious felony."[178]

It thus cannot be maintained that the state has a compelling interest in killing every felon, of every stripe, who flees from arrest. Neither the protection of the general public nor the deterrence of others from crime or from fleeing arrest can override the fleeing nonviolent felon's fundamental right to life. Instead, the real interest of the state in regard to a fleeing suspect consists of apprehending him alive, bringing him to

175. Professor Mikell's oft-quoted questions suggest this same conclusion:

> It has been said, "Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest him?" We answer: because, assuming that the man is making no resistance to the officer, he does not deserve death * * * May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him, we throw every protection around him. We say he cannot be tried until 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provided only three years in a penitentiary for that. . . . Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and are not killing him for fleeing, what are we killing him for?

9 ALI Proceedings 186-87 (1931), *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1014-15 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

176. *See* Appellant's Brief at 19, Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976).

177. 304 F. Supp. 124 (E.D. La. 1969). *See* text accompanying note 182 *infra*.

178. *Id.* at 132 n.24.

trial, and formally punishing him if he is convicted according to fair and just procedures.

Even if the foregoing proposition that the right to life is fundamental is rejected, a mere rationality test leads to the identical conclusion that common-law-based deadly force statutes cannot be sustained. There can be no conceivable rational basis for the existence of a statute permitting the use of deadly force to apprehend *all* fleeing felons. Such deadly force statutes are merely codifications of the common law rule[179] and the common law distinguished between the use of deadly force in order to *prevent* the commission of a crime and its use in order to apprehend one who has already committed a crime. The use of deadly force to *prevent* the commission of a felony was justified only for felonies which involved force or violence, or the threat of such force or violence, which was directed against a *person*. Thus, deadly force could be used to prevent crimes against a person such as murder and robbery, but not impersonal crimes such as burglary or larceny.[180]

The common law, therefore, embraced an irrational distinction between the situations in which deadly force could be employed. Its use was permissible to *prevent* the commission of *only* those felonies which involved serious danger to a person while, on the other hand, its use was permissible to apprehend *all* fleeing persons who had committed *any* type of felony. This irrational distinction has been preserved in many states.[181] It cannot, however, serve as a reasonable basis for the codification and the continued vitality of the common law rule on the use of deadly force to apprehend fleeing felons. This was noted again by the Louisiana district court in *Sauls v. Hutto*[182] in which it held that the mother of a teenaged boy who was killed by police as he fled from the scene of a crashed automobile he had stolen, was entitled to recover damages from the officer in a wrongful death action. The court found that Louisiana statutes did not allow deadly force to be used to prevent the commission of a felony involving only property.[183] Thus, the court concluded: "Since it is illegal for one to use deadly force to *prevent* the commission of a felony involving only property, it is unreasonable (and

179. *See* text accompanying notes 22-24 *supra*.

180. *See* Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 577 (1961); Tsimbinos, *supra* note 21, at 8.

181. *E.g.*, Arkansas (ARK. STAT. ANN. §§ 41-507(1), 41-510(2)(a) (1977)); Connecticut (CONN. GEN. STAT. ANN. §§ 53a-19(a), 53a-22(c)(2) (West 1972)); Florida (FLA. STAT. ANN. §§ 776.012, 776.05 (West 1976)); and New Hampshire (N.H. REV. STAT. ANN. §§ 627:4(II), 627:5(II)(b)(1) (1974)).

182. 304 F. Supp. 124 (E.D. La. 1969).

183. The court characterized this as a marked departure from the common law rule. However, sources listed by the court indicate it was only a classification of the common law. *Id.* at 130. *See* note 180 *supra*.

inappropriate) for a policeman to use deadly force to *arrest* a man suspected of committing such a crime."[184]

Another irrational distinction perpetrated by the common law and continued today in most state law codifications is that between shooting fleeing felons and shooting fleeing misdemeanants.[185] As noted previously, the common law rule that served as a basis for the distinction has outlived its rationale. Thus, the danger posed by a criminal to the public is not determined by a classification of crimes that is based on the maximum sentence one can receive for the crime or the place of incarceration.[186] Even Chief Justice Burger, who is generally regarded as being quite concerned with and mindful of the needs of the police in enforcing law and order, has indicated awareness of the irrationality of such a distinction:

> Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not a car thief, a pickpocket or a shoplifter.[187]

Since it is firmly entrenched in the case and statutory law of most states that there is no rational justification for the use of deadly force to *prevent* the commission of a felony not involving serious force or violence as well as there being no justification for the killing of fleeing misdemeanants, there can be no rational basis for the use of deadly force to apprehend *all* fleeing felons. Thus, no matter what test is applied, the due process clause demands that deadly force statutes allowing the killing of all fleeing felons, whether or not they have used or have threatened to use deadly force themselves, be found unconstitutional.

184. *Id.*

185. *See* text accompanying notes 18-24 *supra*.

186. Such is the modern basis of the distinction between a misdemeanor and a felony. Most states define a misdemeanor as a crime punishable by no more than one year's incarceration in the county jail, while a felony is punishable by more than one year's imprisonment in a state penitentiary.

187. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

The Equal Protection Argument

An analysis of the safeguards afforded by the fourteenth amendment's equal protection clause leads to a similar conclusion. The foundation of an argument relying on the equal protection clause is the different standard of treatment given fleeing felons in relation to fleeing misdemeanants.[188] The challenge is not to a state's right to classify crimes as felonies or misdemeanors as such; rather, it is a challenge to the use of such a classification as a basis for determining who may lawfully be shot to death by the police.[189]

The two-tier analysis traditionally employed by courts in the equal protection area results in an analysis substantially similar to that presented above in regard to substantive due process arguments. If a law results in a suspect classification[190] or deprives some persons of a fundamental right or interest,[191] then the standard of review is one of "strict scrutiny" whereby the state, in order to justify the challenged classification, has the burden of proving that the classification furthers a compelling governmental interest and that it is both necessary to and the least restrictive means of attaining that end.[192] On the other hand, if no suspect classification or fundamental interest is involved, a statutory classification will be upheld as long as there is some mere "rational relationship to a legitimate state purpose."[193] No matter what test is applied, however, common-law-based deadly force statutes should be invalidated.

188. The "classes" involved for equal protection analysis are those persons against whom deadly force may be used and those against whom it may not. In most states, the two classes are fleeing felons and fleeing misdemeanants. *See* text accompanying notes 22-26 *supra*.

189. This basis for an equal protection attack has been misinterpreted by two courts: Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975); Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971).

190. Classifications held suspect are those based on alienage (at least in regard to state legislation), Graham v. Richardson, 403 U.S. 365 (1971); race, Loving v. Virginia, 388 U.S. 1 (1967); and nationality, Oyama v. California, 332 U.S. 633 (1948).

191. *See* note 164 *supra*.

192. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Skinner v. Oklahoma, 316 U.S. 535 (1942).

193. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972). *See also* Marshall v. United States, 414 U.S. 417 (1974); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). A third test seems to have emerged from recent Supreme Court cases. This medium strength test requires that the statutory classification actually advance legitimate articulated state goals. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); McGinniss v. Royster, 410 U.S. 263 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). Deadly force statutes also should be invalidated under this test. Shooting fleeing felons but not fleeing misdemeanants cannot rationally further any of the proposed legitimate state ends. *See* text accompanying notes 197-201 *infra*.

Because the use of deadly force deprives a person of his fundamental right to life, equal protection analysis requires that the statutory policy be subjected to "strict scrutiny." As indicated in the discussion of the substantive due process argument,[194] there is no "compelling" state interest which can support such a policy. None of the asserted governmental interests—the protection of the lives and property of the general public as well as the deterrence of others from committing crimes or from fleeing arrest—can override the fleeing felon's fundamental right to life.[195] Furthermore, none are sufficient to "satisfy the [state's] heavy burden of justification, and [to] insure that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily burden constitutionally protected interests."[196]

However, even if the more deferential standard of equal protection analysis applicable when fundamental rights are not at stake is employed, there still can be found no minimum rational relationship between a common-law-based deadly force policy and a legitimate state purpose. As discussed in regard to substantive due process analysis,[197] possible goals of the state that such a use of deadly force arguably can achieve include the protection of the public from harm, the prevention of the particular perpetrator from committing future crimes, deterrence of others from committing crimes, and the deterrence of those who do commit crimes from fleeing arrest. However, to the extent they are legitimate, these interests are not served by a policy which fails to operate so as to rationally advance the asserted purposes.[198] Protection of the general public is not rationally furthered by a statute authorizing the killing of fleeing felons but not fleeing misdemeanants. Rather, only classifications based on the distinction between those who caused or threatened serious bodily harm to a person, or who pose a substantial risk of so doing in an attempt to flee, and those who have not caused or threatened such serious personal injury can serve the purported state goal. As to the goal of preventing a fleeing suspect from committing future crimes, a legislature might find that felony suspects are more likely to commit crimes in the future than misdemeanor suspects. It is doubtful that any state legislature has made such a determination before codifying the common law rule, and thus such a policy is based on mere speculation that hardly can justify taking a person's life. Furthermore, it is unlikely that such a finding can ever be made according

194. *See* text accompanying notes 161-78 *supra*.
195. *See* text accompanying notes 166-74 *supra*.
196. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974).
197. *See* text accompanying notes 169-74 *supra*.
198. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 537 (1973).

to a general felon-misdemeanant distinction for it has been determined, for example, that murderers are seldom recidivists.[199] Thus, if the state's goal is to prevent a fleeing suspect from committing future crimes, it would be rational to exclude murderers from the category of those who can lawfully be shot to death. Yet, if any criminals have rationally forfeited their right to life, it could be argued, murderers have done so. Furthermore, it would only be rational to kill fleeing felons if it were found that the future crimes which they are more likely to commit than misdemeanants involve serious violence to persons. What rational basis can support a determination that it is justifiable to kill a fleeing burglar because a fleeing burglar is more likely to commit future burglaries than a fleeing petty thief[200] is likely to commit future petty thefts? Thus, the proposition that a rational relationship exists between the felon-misdemeanant classification in deadly force statutes and the purported goal of preventing future crimes is untenable.

In regard to the asserted state interest in deterring others from committing crimes and deterring those who do commit crimes from fleeing apprehension,[201] the felon-misdemeanant classification can only be justified if killing fleeing felons will increase the deterrence of crime and flight from apprehension more than killing fleeing misdemeanants will. However, it appears more reasonable to conclude that the converse would be true: killing fleeing misdemeanants would likely have a greater deterrent effect because there would be more killing with more widespread publicity of the likely fate of fleeing criminals of every stripe, leading to the installation of increased fear in all potential criminals. Yet it is beyond imagination that at this point in history any legislature or law enforcement agency would approve the policy of killing anyone suspected of committing a minor infraction who flees apprehension. Thus, there again appears to be no rational basis for the purported state goals.

It has been suggested that, although an equal protection argument has merit, it misses the essential point: "The real objection to the use of deadly force against nonviolent felony suspects is not that such laws discriminate between nonviolent felony suspects and misdemeanants, but that nonviolent suspects are shot at all."[202] Furthermore, the argu-

199. *See* Mattis v. Schnarr, 404 F. Supp. 643, 649 (E.D. Mo. 1975); Appellant's Brief at 55, Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976).

200. Burglary is generally classified as a felony while theft of items of minor value is classified as a misdemeanor.

201. *See* text accompanying notes 171-74 *supra*.

202. *Deadly Force to Arrest, supra* note 21, at 379. The Eighth Circuit agreed with this viewpoint in perfunctorily dismissing an equal protection argument while striking down the Missouri deadly force statutes on due process grounds. *See* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir.

ment goes, a victory in declaring a common-law-based deadly force statute unconstitutional which is founded on the equal protection argument would be "at the expense of intellectual honesty and doctrinal clarity."[203] Indeed it may be more "intellectually honest" to attack deadly force statutes on substantive due process grounds. Yet if a court is more intellectually comfortable with a meritorious argument presented in a traditional equal protection framework, concerns of "doctrinal clarity" should not inhibit it from declaring the unconstitutionality of a law that permits the slaying of nonviolent felony suspects, whether "truly" members of a class or not. The equal protection clause, therefore, is a viable basis for invalidating common-law-based deadly force statutes.

The Eighth Amendment Argument

An argument based on the eighth amendment's proscription of cruel and unusual punishment has been advanced in several cases[204] to prove such statutes' unconstitutionality, but the court in each case has rejected the argument. Although the proposition has considerable attractiveness, its treatment by the courts makes its usefulness as a vehicle to invalidate deadly force statutes extremely doubtful.

One formidable barrier is the question of whether the use of deadly force to apprehend a fleeing nonviolent felon falls within the ambit of the word "punishment" in the eighth amendment.[205] The history and judicial application of the amendment indicate that the use of deadly force against fleeing suspects *does* constitute punishment. The debates surrounding the adoption of the United States Constitution demonstrate that the cruel and unusual punishment clause was intended to apply not only to post-conviction penalties but also to pretrial treatment of suspects.[206] Courts have thus held the proscriptions of the eighth amendment applicable to pretrial treatment of those arrested and detained as well as to pretrial conditions of confinement, even though such treatment is not intended as "punishment" in the post-

1976). *See also* Justice Stewart's concurring opinion in Zablocki v. Redhail, 434 U.S. 374, 391 (1978), *quoted in* note 161 *supra*.

203. *Deadly Force to Arrest, supra* note 21, at 380.

204. Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976); Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975); Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971).

205. U.S. CONST. amend. VIII states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

206. *See* 3 J. ELLIOT'S DEBATES 447-52 (2d ed. 1876), *quoted in* Furman v. Georgia, 408 U.S. 238, 259-62 & nn.2&3 (1972) (Brennan, J., concurring); 408 U.S. at 320-21 (Marshall, J., concurring).

conviction sense of the word.[207] Furthermore, the fact that most deadly force statutes are merely codifications of the common law rule indicates that the use of deadly force is "punishment." Since most felonies at common law were punishable by death, the use of deadly force was justified as merely accelerating in time the penalty the criminal had already incurred by his conduct.[208] Thus, "punishment" was a principal purpose of the common law rule. The Supreme Court has stated that "[i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoers, to deter others, etc., it has been considered penal."[209] It therefore appears that the use of deadly force is punishment within the contemplation of the eighth amendment.

Nevertheless, no court has been willing to so hold. The district court in *Cunningham v. Ellington*[210] was apparently the first court to be confronted with the contention that a common-law-based deadly force statute violates the eighth amendment's proscription of cruel and unusual punishment. The *Cunningham* court cavalierly dismissed the argument: "[T]he short answer to plaintiffs' contention is that we simply are not dealing with punishment."[211] Courts confronted with subsequent challenges based on the cruel and unusual punishment clause generally have merely cited the *Cunningham* court's holding.[212] The unwillingness of even the Eighth Circuit in *Mattis v. Schnarr* to consider the use of deadly force as "punishment" does not bode well for the viability of this argument.[213]

207. *See* Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); Wilson v. Beame, 380 F. Supp. 1232 (S.D.N.Y. 1974); Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971); United States *ex rel.* von Wolfendorf v. Johnston, 327 F. Supp. 66 (S.D.N.Y. 1970); *In re* Birdsong, 39 F. 599 (S.D. Ga. 1889).

208. *See* text accompanying notes 18-21 *supra*.

209. Trop v. Dulles, 356 U.S. 86, 96 (1958).

210. 323 F. Supp. 1072 (W.D. Tenn. 1971).

211. *Id.* at 1075.

212. The Sixth Circuit in Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977), implicitly adopted the *Cunningham* court's holding when it quoted the opinion of the *Wiley* district court, which had relied entirely on *Cunningham*. *Id.* at 1251. The district court in Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975), took note of the holding in *Cunningham*; it then held alternatively that, even assuming that use of deadly force is to be considered punishment, an eighth amendment attack must fail because the fact that so many states authorize the use of deadly force against all fleeing felons "surely give[s] credence to the proposition that the limits of civilized standards have not been exceeded." *Id.* at 651. The Eighth Circuit in Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), while finding the Missouri deadly force statutes unconstitutional, did not decide on eighth amendment grounds, although it was expressly presented with that contention. It noted that a good argument could be made for a decision based on the eighth amendment but then further noted that other courts "have held that an officer's use of deadly force to arrest is not punishment within the meaning of the Eighth Amendment as the arresting officer has no power to punish and may be violating the law if he seeks to do so." *Id.* at 1020 n.32.

213. The thread common to all decisions in which the cruel and unusual punishment clause has been held applicable is the detention and confinement of the person "punished." Courts gen-

If a court were to find that the use of deadly force constitutes punishment, then standards of eighth amendment review enunciated by the Supreme Court in its 1972 death penalty case, *Furman v. Georgia*,[214] and its 1976 death penalty cases[215] may be applicable to the use of deadly force. Factors which led to the invalidation of the death penalty laws challenged in *Furman* include the danger of the arbitrary and standardless imposition of the death penalty, the severity of a penalty which is so extreme as to degrade man's dignity, the disproportionate harshness of the penalty in relation to any legitimate need asserted to justify it, and cruelty which violates evolving standards of decency. The 1976 cases emphasize that a penalty cannot be imposed without focusing on the individual defendant and the nature of the particular crime. Such standards provide the basis for valid arguments against the constitutionality of the use of deadly force against nonviolent felons,[216] once a court admits that such use is "punishment."

The Fourth Amendment Argument

Finally, an argument can be made that the fourth amendment's proscription of unreasonable seizures[217] mandates that common-law-based deadly force statutes be held unconstitutional. Apparently only the district court and the Sixth Circuit in *Wiley v. Memphis Police Department* have been confronted with such an argument.[218] The *Wiley* district court dismissed the fourth amendment claim as meritless because the plaintiff had been unable to cite any federal cases which had construed the amendment to apply to the use of deadly force by the police to effect the arrest of nonviolent felony suspects.[219] Al-

erally have had no conceptual difficulty with declaring that treatment of confined individuals who are awaiting trial and have not been convicted of any crime should be governed by the protections of the eighth amendment at least as much as the treatment of those actually convicted. *See, e.g.*, Rhem v. McGrath, 326 F. Supp. 681, 690 (S.D.N.Y. 1971). It requires a much greater conceptual leap to state that treatment of a person not yet in the custody of the state is punishment. Courts might prefer to leave such situations under the protection of the due process clause or the fourth amendment.

214. 408 U.S. 238 (1972).

215. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

216. *See* Brief for Appellant at 77-79, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); *Deadly Force to Arrest, supra* note 21, at 382-83.

217. U.S. CONST. amend. IV provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

218. The Eighth Circuit, in Mattis v. Schnarr, noted that it "has also been suggested that statutes of this type can be held violative of the Fourth Amendment" but stated that it would not consider the approach since it was not considered in the district court and was not advanced on appeal. 547 F.2d at 1020 n.32.

219. Brief for Appellant at 68, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

though the contention was again argued on appeal, the Sixth Circuit refrained from mentioning the fourth amendment claim in affirming the district court's upholding of the validity of the Tennessee statute.

However, an argument may be made that the use of deadly force to apprehend fleeing suspects certainly implicates the fourth amendment because any form of physical arrest is a "seizure" within the amendment's ambit.[220] Since the fourth amendment requires all seizures to be reasonable,[221] the use of deadly force against nonviolent suspects can be upheld only if the practice is reasonable not only in regard to the general method chosen for making seizures[222] but also in regard to the manner in which the specific seizure was made.[223] Thus, it may be argued that when deadly force is applied against a fleeing felon who caused or threatened no serious harm to anyone in the commission of the crime or during his attempt to escape, the manner of "seizure"—killing him—is grossly unreasonable. It is the "most intrusive and destructive possible method or manner of making a seizure of a person."[224] It is therefore possible that common-law-based deadly force statutes may be held unconstitutional as violative of the fourth amendment.

CONCLUSION

At common law a police officer was authorized to use deadly force in order to effect the arrest of any fleeing felon, even if his crime was nonviolent and he posed no threat of serious harm to anyone. This rule is still essentially followed in most jurisdictions even though its rationale no longer has relevance and has been widely rejected by legal scholars and law enforcement agencies and commissions throughout the country.

Nevertheless, thus far the Court of Appeals for the Eighth Circuit, in *Mattis v. Schnarr*, is the only court to have held such a common-law-based deadly force statute unconstitutional, and that decision was vacated by the United States Supreme Court on other grounds. Courts have been reluctant to strike down such statutes because they believe the task is more properly that of the state legislatures. However, courts

220. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976); Cupp v. Murphy, 412 U.S. 291 (1973); Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958).

221. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

222. Schmerber v. California, 384 U.S. 757, 771 (1966).

223. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 28-29 (1968); Schmerber v. California, 384 U.S. 757, 771 (1966); Ker v. California, 374 U.S. 23, 38 (1963).

224. Brief for Appellant at 73, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

cannot abdicate their duty of ensuring that individuals are not deprived of their constitutional rights. The Eighth Circuit recognized its duty and, clothing its decision in primarily substantive due process garb, held that such statutes violate a fleeing felon's fundamental right to life.

Either the substantive due process analysis used by the Eighth Circuit or an equal protection analysis provides the most viable basis from which other courts can declare the unconstitutionality of common-law-based deadly force statutes. Arguments grounded in the fourth and eighth amendments also are potential bases for such a holding. As suggested by the Eighth Circuit, the adoption of the Model Penal Code approach, whereby police may use deadly force solely against a fleeing felon who himself has used or threatened to use deadly force against another during the commission of the crime or his attempt to escape, is the only rational and civilized response to the problem.

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